(5)

No. 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREEN MANAGEMENT LIMITED, MURRAY LAWRENCE & PARTNERS, D.P. MANN UNDERWRITING AGENCY LIMITED, ROBIN A.G. JACKSON, PETER N. MILLER, EDWARDS & PAYNE (UNDERWRITING AGENCIES) LIMITED, and STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

MOLLY S. BOAST
Counsel of Record
FREDERICK B. LACEY
LAWRENCE W. POLLACK
STEPHEN H. OREL
LEBOEUF, LAMB, LEIBY & MACRAE
520 Madison Avenue
New York, New York 10022
(212) 715-8000

Of Counsel:
ANDREAS F. LOWENFELD
40 Washington Square South
New York, New York 10012
(212) 998-6208

Counsel for Petitioners Peter N. Miller, Merrett Underwriting Agency Management Limited, Robin A.G. Jackson, Three Quays Underwriting Management Limited, Janson Green Management Limited, Murray Lawrence & Partners, and D.P. Mann Underwriting Agency Limited

(For Further Appearances See Reverse Side of Cover)

BARRY L. BUNSHOFT
AUBIN K. BARTHOLD
WILLIAM J. CASEY
ERIC J. SINROD
HANCOCK, ROTHERT &
BUNSHOFT
Four Embarcadero Center
San Francisco, CA 94111-4168
(415) 981-5550

Counsel for Petitioner Edwards & Payne (Underwriting Agencies) Limited

BARRY OSTRAGER
MARY KAY VYSKOCIL
SIMPSON THACHER
& BARTLETT
425 Lexington Avenue
New York, NY 10017-3909
(212) 455-2000

Counsel for Petitioner Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd.

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OCTOBER TERM, 1991

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREEN MANAGEMENT LIMITED, MURRAY LAWRENCE & PARTNERS, D.P. MANN UNDERWRITING AGENCY LIMITED, ROBIN A.G. JACKSON, PETER N. MILLER, EDWARDS & PAYNE (UNDERWRITING AGENCIES) LIMITED, and STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Petitioners Merrett Underwriting Agency Management Limited, Three Quays Underwriting Management Limited, Janson Green Management Limited, Murray Lawrence & Partners, D.P. Mann Underwriting Agency Limited, Robin A.G. Jackson, Peter N. Miller, Edwards & Payne (Underwriting Agencies) Limited, and Sturge Reinsurance Syndicate Management Limited respectfully submit this reply brief in support of their petition for a writ of certiorari.

Plaintiffs-Respondents do not controvert any of the reasons advanced by petitioners why the writ should be granted. Plaintiffs do not dispute that "(t)his Court has never addressed the question whether and to what extent the extraterritorial reach of this nation's

economic regulatory laws is restrained by considerations of international law and comity." *Petition* at 3. Nor do Plaintiffs disagree that "(t)his Court has stressed that Americans courts should weigh the interests of foreign nations carefully before approving or embarking on a course of action likely to cause a conflict with foreign law." *Petition* at 20. Plaintiffs do not even controvert that this case presents an unprecedented expansion of American jurisdiction that would supplant the considered policies, interests and traditions of a foreign sovereign. *Petition* at 18-19.

Instead, plaintiffs rely on a "global conspiracy" theory whose rejection by the district court was upheld by the Ninth Circuit. Plaintiffs also contend that application of the U.S. antitrust laws to the London reinsurance market as envisioned by the claims at issue would raise no conflict with British law and policy, even though both courts below agreed with the British government that a substantial conflict would arise from the assertion of jurisdiction in this case. Finally, plaintiffs rely on the opinion of this Court in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990), an inapposite case the court below rightly saw no need to reference.

ARGUMENT

I. Plaintiffs' Dismissed Global Conspiracy Claim is No Answer to the Compelling Reasons to Grant the Writ

Plaintiffs defend the assertion of jurisdiction over three claims that name only foreign defendants and charge only foreign conduct on the spurious ground that allegations in other claims about conduct by other groups of defendants support the exercise of such jurisdiction. Plaintiffs acknowledge that "principles of international comity [can] require abstention from the exercise of jurisdiction." *Respondents' Consolidated Brief in Opposition to Petitions for Writs of Certiorari* ("*Respondents' Br.*") at 21. Plaintiffs argue, however, that "under any recognized comity test," jurisdiction is proper in this case because of the supposedly "overarching American focus of the complaints" reflected by allegations of "a complex and overlapping pattern of conspiratorial activity" involving both foreign and domestic defendants. *Respondents' Br.* at 22.

The comity issue, however, emanates solely from the three discrete claims in the complaints that name only British defendants and allege material conduct occurring entirely in England. As far as these counts are concerned, there are no factual allegations anywhere in any of the complaints that support the reference in plaintiffs' brief to the supposed "integral involvement of domestic companies in the scheme to withhold reinsurance." *Respondents' Br.* at 22. Plaintiffs rest their opposition to the petition on this ground because they are otherwise unable to defend the Court of Appeals' decision.

There is no "dispute" about the nationality of the defendants or the locus of the challenged conduct.[1] *Respondents' Br.* at 23. The complaints speak for themselves: all the defendants in the relevant claims are English, and all material conduct happened in England. It is precisely these features of the London reinsurance claims that make this case a compelling vehicle for this Court to consider the extraterritorial reach of this nation's economic regulatory laws.

II. Plaintiffs' Claim That the Complaints Would Raise No Conflict with British Law Contradicts the Findings of Both Courts Below as well as the Views of the British Government

Although plaintiffs say that this case does not involve a "genuine conflict" with foreign law or policy, both courts below found to the contrary. A-29, 75. In its brief as *amicus curiae* before this Court, the British government has now reiterated to this Court what it told the Ninth Circuit, and what that Court accepted (A-29): "[T]o subject British nationals to substantial legal liability for conduct in London which the District Court properly found was "conducted in conformity with English law. . . . [for] a legitimate business purpose" would raise a substantial conflict with British law and policy. *Brief of the Government of the United Kingdom of Great Britain and*

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[1] Plaintiffs are in no position to raise factual disputes as to the nationality of the defendants or the locus of the challenged conduct. They had every opportunity to undertake discovery in opposition to the motions to dismiss. A-78.

Northern Ireland as Amicus Curiae in Support of Petitioners at 9.[2]

Plaintiffs contend that petitioners "have effectively asked this Court to show greater deference to the supposed regulatory interests of the United Kingdom than to the regulatory interests of one of the states of this country." *Respondents' Br.* at 25 n.31. Indeed, petitioners submit, and this Court has so held in other contexts, that greater respect is due to the interests of a foreign sovereign than to the interests of states in the federal union, precisely because different considerations and different relationships are at stake in the international context. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("concerns of international comity" require enforcement of agreement to arbitrate antitrust dispute arising out of international contract, "even assuming that a contrary result would be forthcoming in a domestic context"). Under the Supremacy and Commerce Clauses, Congress may, of course, override state interests when it sees fit. Neither Congress nor the courts have comparable authority under international law to override the interests of foreign nations.

III. Plaintiffs' Reliance on the W.S. Kirkpatrick Case is Misplaced

Plaintiffs say that the "powerful logic" of this Court's opinion in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990), controls this case. *Respondents' Br.* at 20 n.21 and 21 n.23. *Kirkpatrick* involved an attempt to expand the act of state doctrine in order to shield corrupt defendants. The case in no way involved international law. 493 U.S. at 404-05. By contrast, the petition herein expressly involves international law, *i.e.*, the principle of reasonableness in the exercise of jurisdiction. *See* §§ 402 and 403 of the *Restatement (Third) of the Foreign Relations Law of the United States* (*see*

[2] Plaintiffs are incorrect in asserting that British law does not permit the challenged conduct. *Respondents' Br.* at 24 n.30. The *Restrictive Trade Practices (Services) Order* 1976, S.I. 1976 No. 98, Schedule ¶ 8 (*see Petition* at 6 n.4), cited by the district court (A-73), has the force of law.

Petition at 15-16), and comment a to § 403. *Kirkpatrick*'s logic thus has scant, if any application in this case.

Kirkpatrick is relevant in one sense, however. There, the Court seized the opportunity to clarify the jurisdiction of American courts in cases charging illegal conduct by Americans abroad.[3] This case is bigger and more important than *Kirkpatrick* in every way: it represents a challenge to an entire industry centered and regulated abroad that results in conflict with the laws and policies of a foreign sovereign.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MOLLY S. BOAST
Counsel of Record
FREDERICK B. LACEY
LAWRENCE W. POLLACK
STEPHEN H. OREL
LeBOEUF, LAMB, LEIBY & MacRAE
520 Madison Avenue
New York, New York 10022
(212) 715-8000

[3] The facts in *Kirkpatrick* did not implicate principles of comity. Plaintiff in *Kirkpatrick* alleged that its U.S. competitor won a Nigerian Air Force contract by bribing Nigerian government officials. Not only had two of the U.S. defendants already pleaded guilty to violating the Foreign Corrupt Practices Act, it was undisputed that the conduct at issue violated Nigerian law as well. 493 U.S. at 402. There was thus no possibility of conflict with foreign law or policy.

Of Counsel:

ANDREAS F. LOWENFELD
40 Washington Square South
New York, New York 10012
(212) 998-6208

Counsel for Petitioners Peter N. Miller; Merrett Underwriting Agency Management Limited (sued herein as Merrett Underwriting Management Limited); Robin A.G. Jackson; Three Quays Underwriting Management Limited (sued herein as Three Quays Underwriting, Ltd.); Janson Green Management Limited (sued herein as Janson Green, Ltd.); Murray Lawrence & Partners (sued herein as Harvey Bowring, Ltd. - Murray Lawrence and Partners); D.P. Mann Underwriting Agency Limited (sued herein as D.P. Mann & Others (U.A.), Ltd.).

BARRY L. BUNSHOFT
AUBIN K. BARTHOLD
WILLIAM J. CASEY
ERIC J. SINROD
HANCOCK, ROTHERT & BUNSHOFT
Four Embarcadero Center
San Francisco, CA 94111-4168
(415) 981-5550

Counsel for Petitioner Edwards & Payne (Underwriting Agencies) Limited (sued herein as Edwards and Payne Management (U.A.), Ltd.).

BARRY OSTRAGER
MARY KAY VYSKOCIL
SIMPSON THACHER & BARTLETT
425 Lexington Avenue
New York, New York 10017-3909
(212) 455-2000

Counsel for Petitioner Sturge Reinsurance Syndicate Management Limited, successor in interest to Oxford Syndicate Management Ltd. (sued herein as K.F. Alder & Others (U.A.), Ltd.)

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